No. 90-549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity, ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

LENNOX S. HINDS
STEVENS, HINDS, and WHITE
116 West 111th Street
New York, New York 10026
(212) 864-4445

*FRANK E. DEALE
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6427
Attorneys for Respondent

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

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INTRODUCTION

The United States, as Amicus Curiae, has filed a brief in this case which recommends that the petition for certiorari be

held for disposition until this Court's decision in Siegert v. Gilley, 111 S.Ct. 292 (1990). Respondent respectfully disagrees with this recommendation.

ARGUMENT

Neither the Brief Amicus Curiae of the United States nor the Brief for the Respondent in Siegert v. Gilley address the standard which should govern this case, which is postured after the conclusion of discovery rather than at the pleading stage.[1] For a case which is postured at the pleading stage, the United States argued as Respondent in Siegert that a plaintiff "may not rely on subjective allegations, . . . attenuated inferential and circumstantial allegations, . . . or otherwise conclusory allegations . . . Rather, the plaintiff must set forth objective facts that are 'specific and concrete' and 'raise a genuine issue as to the objective reasonableness of the defendant's conduct." Brief for the Respondent in Siegert v.

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[1]The Brief of the United States does not endorse the argument of the petition for certiorari (at 24-30) that some variation of the test articulated by this Court in Matsushita Electric Industrial Co. v Zenith Radio Corp., 475 U.S. 574 (1986) should apply.

Gilley at p. 21, n.13.(emphasis in original). This test is extracted from two D.C. Circuit opinions, Smith v. Nixon, 807 F. 2d 197, 201 (D.C. Cir. 1986) and Halperin v. Kissinger (Halperin II), 807 F. 2d 180 (D.C. Cir. 1986), which dealt with the exigencies of national security investigations.

In addition to the fact that Wharton v. Dube does not involve national security issues, the concrete reality of the pending case is that every one of four seasoned federal judges who examined respondent's evidence were convinced that the evidence met the test outlined in the Siegert brief. See generally, Wharton v. Dube, Respondents Brief in Opposition.

Therefore, a decision by this Court affirming the decision of the D.C. Circuit that petitioner in Siegert did not produce enough evidence at the pleading stage to entitle him to discovery, should have no bearing on the fact that Wharton v. Dube is not certworthy in its present posture since respondent Dube produced more than sufficient evidence. A decision to hold this case pending a decision in Siegert will only delay the movement of the case for no appreciable purpose.

Respondent respectfully suggests a number of perils which will follow from a decision to review the sufficiency of the evidence adduced by respondent Dube after discovery. First, such a decision will increase to three the number of opportunities for defendants in similar cases to come to this Court raising the same claims during the pendency of one litigation. Whether the appeal is at the pleading stage, at the completion of discovery, or after final judgment, respondent suggests that such multiple appeals will enormously delay litigation and make trials vastly more complicated because of the diminution of human memory. Cf. Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 70-72 (1989). Although respondent recognizes the need for governmental immunity from trials on frivolous allegations, appellate review at the pleading stage and post-trial review of a final judgment should be adequate to serve this purpose.

Furthermore, review of this case at post-discovery will contribute to the decreasing importance of the traditional Rule

56 criteria for resolving summary judgment motions in qualified immunity cases. The severe disputes of material fact in this case seem to have been overlooked in the haste to address the qualified immunity issue. These factual disputes are clear from the briefs filed and indicate that this case is totally inappropriate for resolution on summary judgement. The issue of immunity in this case is not a "purely legal one" as counseled by the Court in Mitchell v. Forsyth, 472 U.S. 511, 528 n. 9. Rather, it is entangled in a complicated factual morass that should be worked out in the first instance by the trier of fact.

Furthermore, since this action "involves claims for injunctive relief that will have to be adjudicated regardless of the resolution of any damage claims," Mitchell v. Forsyth, 472 U.S. at 519, n.5 Supreme Court review of this matter at this stage is even more inappropriate.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should not be held pending disposition in Siegert v. Gilley, but

should be denied forthwith.

Respectfully submitted,

Lennox Hinds
Stevens, Hinds, and White
116 West 111th Street
New York, New York 10026
(212) 864-4445

*Frank E. Deale
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6427
Attorneys for Respondent

*Counsel of Record

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